No. 82-1579

IN THE

Supreme Court of the United States

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,

Appellant,

and

STATE OF MINNESOTA,

Appellant/Intervenor,

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

On Appeal From the United States Court of Appeals for the Eighth Circuit

RESPONSE OF APPELLEE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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STATEMENT

This brief of Appellee Chicago and North Western Transportation Company is submitted to supplement the matter contained in Appellee's Motion to Affirm, and will specifically respond to matters raised in the Brief for the United

States as Amicus Curiae (hereinafter "Solicitor General's Brief").

ARGUMENT

The Solicitor General's Brief fails to establish that the District Court and Court of Appeals incorrectly concluded that, on the facts presented, 49 U.S.C. §10905 (Supp. IV 1980) preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn a properly abandoned rail line in order to continue rail service on that line.

1. The Court of Appeals concluded that the elaborate procedural detail of Section 10905 indicates that not only has Congress granted the Interstate Commerce Commission (hereinafter the "Commission") exclusive and plenary authority to regulate abandonments, *Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320 (1981), Congress has also granted the Commission exclusive and plenary authority to provide for continuation of rail service in connection with abandonments (J. S. App. A-7).

The Solicitor General argues that offers of financial assistance under Section 10905 are not designed to operate to the exclusion of "post-abandonment acquisition" procedures (e.g., forced sales via state condemnation).[1] The Solicitor General asserts the sole purpose of Section 10905

[1]The Solicitor General admits the Commission has exclusive and plenary authority over abandonments and states this authority extends to pre-abandonment offers of financial assistance under Section 10905 (Solicitor General's Brief at 9-10). Inexplicably, however, the Solicitor General supports the use of so-called "post-abandonment acquisition" procedures which would effectively usurp the Commission's authority pursuant to, and undermine the purposes of, Section 10905.

is to diminish delay in the issuance of the abandonment certificate that relieves the carrier of its obligation under federal law to continue rail operation. Under this construction, once the abandonment certificate is issued and carrier service ceases, state condemnation would not interfere with the accomplishment of Congress' purposes in enacting Section 10905. This attempt to reconcile state condemnation with Section 10905 is overly-simplistic, and ignores the purposes and federal interests underlying the enactment of Section 10905 (*see* Motion to Affirm at 7-12).

The Commission and the courts have explicitly recognized that burdens on interstate commerce arise not only from losses sustained by carriers operating unprofitable lines, but also from the dedication of rail assets to unprofitable uses which could be used profitably elsewhere. *Ex Parte 274 (Sub-No. 3)—Abandonment of Railroad Lines, Use of Opportunity Costs*, 360 I.C.C. 571 (1979). *See also, Missouri Pac. R.R. Co. v. United States and Interstate Commerce Commission*, No. 79-1259 (8th Cir. March 17, 1980); *State of Maine, Dep't. of Transportation v. Interstate Commerce Commission*, 587 F.2d 541 (1st Cir. 1978); *In re Boston and Maine Corp.*, 596 F.2d 2 (1st Cir. 1979).

The Solicitor General's failure to acknowledge these "Opportunity Costs" cases, and the very important federal interests they represent, evinces a superficial understanding of the abandonment process and the federal interests involved.[2] While the issuance of an abandonment certificate

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[2]The Solicitor General incorrectly states: "Typically, a carrier that abandons a rail line simply leaves in place the track and other permanent physical facilities that had been used in providing service" (Solicitor General's Brief at 14, n. 13). This remark is absolutely unsupported by the record and by everyday experience. Contrary to the Solicitor

may end a carrier's operating losses, the carrier would still be unable to profitably and productively reuse its track materials elsewhere if the carrier is subjected to protracted state condemnation actions. In the instant case, Appellant's purported state condemnation action has subjected Appellee to the precise "protracted legal proceedings"[3] which the procedures set forth in Section 10905 were clearly designed to avoid (J.S. App. A-7).[4] The so-called "post-abandonment acquisition" procedures in this context stand as an obstacle to the accomplishment of Congress'

General's assertion, the reuse of rail and track material from abandoned lines on profitable lines elsewhere is the rule, not the exception. This remark underscores the Solicitor General's lack of understanding of the abandonment process, and perhaps explains the Solicitor General's simplistic view of Section 10905 and the federal interests affected by Section 10905.

[3]By enacting Section 10905, Congress intended to "assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to extend the abandonment process." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 125, *reprinted in* [1980] U.S. Code Cong. & Ad. News 3978, 4110, 4157 (J.S. App. A-6).

[4]Appellant has not yet filed its condemnation action, for reasons understood by neither Appellee nor the Court of Appeals (J.S. App. A-7).

In granting this abandonment, the Commission made a specific finding that there was a need elsewhere in Appellee's system for reusable track and other materials. See Chicago and North Western Transp. Co. — Abandonment Between Oelwein, Ia. and Randolph, Mn., I.C.C. Docket No. AB-1 (Sub-No. 113F) (Decision dated July 10, 1981, served July 15, 1981). This litigation continuously restrained Appellee's removal of the subject track and appurtenances from March 31, 1982 to February 9, 1983. The rail from the 19.2-mile segment of line, which Appellee had planned to utilize to fulfill its contracts with the State of Iowa and certain Iowa shippers to upgrade major grain hauling lines in Iowa, remained intact for one year beyond the time of its anticipated removal in April, 1982, thus disrupting the rail upgrading program and frustrating the effectuation of the Commission's decision.

intent to permit carriers to abandon unprofitable lines and reuse otherwise productive and profitable rail assets elsewhere, and are preempted by Section 10905.

2. The Solicitor General continues to recite the argument unsuccessfully advanced by Appellant before the courts below, namely, that preemption has not occurred as the jurisdiction of the Commission ends with the issuance of an abandonment certificate (Solicitor General's Brief at 9). This argument was fully considered and rejected by the Court of Appeals (J.S. App. A-10 to A-11). The issue involved is not one of Commission "jurisdiction", but whether Minnesota condemnation authority would frustrate the accomplishment of Congress' objectives in enacting Section 10905 (J.S. App. A-10 to A-11). There is simply no question that Congress' intent to protect carriers from "protracted legal proceedings" and to permit carriers to expeditiously abandon unprofitable lines to facilitate the reuse of rail assets elsewhere would be undermined by Appellant's and the Solicitor General's proffered construction of Section 10905.

3. The Court of Appeals noted Section 10905 also demonstrates Congress' concern with the orderly operation of rail lines after their transfer under Section 10905(f) (J.S. App. A-6 to A-7). The Solicitor General completely disregards this provision of Section 10905 and the legislative purpose it represents.

Under the Solicitor General's abandonment scenario, a party could avoid the two year service commitment under Section 10905(f)(4) by merely waiting until after the abandonment certificate is issued to acquire by condemnation the rail line for continued rail use. Clearly, the availability of such a "post-abandonment acquisition" procedure deci-

mates the effectiveness of Section 10905 in providing for the orderly transfer and operation of rail lines following abandonment.

4. The Solicitor General incorrectly asserts that state condemnation would not circumvent the Commission's determination of value of the 19.2-mile segment of railroad line (Solicitor General's Brief at 14-15). The Solicitor General's Brief (at 10) states that an offeror of financial assistance who invokes the Commission's jurisdiction to establish conditions and compensation pursuant to Section 10905(f)(1) and who later withdraws the offer pursuant to Section 10905(f)(2) is thereupon free to resort to state condemnation authority to acquire the rail line.[5] The Solicitor General thus endorses the price-shopping utilized by Appellant in this case. This untenable interpretation of Section 10905 would serve only to invite the "protracted legal proceedings" which Section 10905 was clearly designed to avoid.

Section 10905(f)(1)(A) provides for the Interstate Commerce Commission to determine the value of a railroad line in connection with abandonments.[6] The Commission's

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[5]The Solicitor General incorrectly suggests that upon an offeror's withdrawal of an offer of financial assistance, Congress "intended that the situation would return to the status quo ante" (Solicitor General's Brief at 10). This assertion is simply unwarranted. Upon the withdrawal of an offer of financial assistance, any other offeror may purchase or subsidize the rail line, but only if such an offeror accepts the conditions and amount of compensation established by the Commission in connection with the original offer. See 49 C.F.R. §1152.27(m)(3) (1982).

[6]The Solicitor General's attempt to discredit the Commission's valuation procedures is unfounded (Solicitor General's Brief at 15). Section 10905(f) valuation procedures were held constitutionally adequate under *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) by at least one court. See *Chicago and North Western Transp. Co. v. United States*, 678 F.2d 665, 671 (7th Cir. 1982).

jurisdiction under Section 10905(f) was invoked by the incorporators and principals of Appellant. The Commission determined, in an unappealed order, that the net liquidation value of the 19.2-mile segment of line was in excess of $1.7 million (Motion to Affirm App. A-32). Where Congress has given the Commission authority to determine value and where the Commission has in fact determined that value, it is imprudent as a matter of policy to require a carrier to re-litigate the question of value in a state court. Appellant's attempt to invoke state condemnation proceedings in an effort to obtain an independent valuation of the line is squarely an impermissible collateral attack on the Commission's determination of value.[7] See *Village of Mantorville v. Chicago Great Western Ry. Co.*, 8 F. Supp. 791 (D. Minn. 1934).

CONCLUSION

Minnesota state law, which would purport to authorize Appellant to condemn Appellee's abandoned railroad line for continued rail purposes, "stands as an obstacle to the

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[7]The Solicitor General "take[s] no position on the propriety of the state injunction in light of . . . the specific orders of the Commission in this case (see Mot. to Aff. 17 n. 16)." (Solicitor General's Brief at 14, n. 13). Appellee's Motion to Affirm (at 17, n. 16) asserted the argument raised in the courts below that Appellant's resort to Minnesota condemnation law in an effort to prevent Appellee's removal of the subject track also constitutes an impermissible collateral attack on the Commission's decision and order expressly permitting Appellee to remove the subject track and ties. See Chicago and North Western Transp. Co. — Abandonment Between Oelwein, Ia. and Randolph, Mn., I.C.C. Docket No. AB-1 (Sub-No. 113F) (Certificate and Decision decided October 7, 1981, served October 9, 1981). The Commission's decision and order to specifically "permit the removal of rail and ties" was explicitly made a part of the Commission's order in connection with the abandonment proceedings. *Id.*

accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 102 S.Ct. 3014, 3022 (1982), and is thus preempted by 49 U.S.C. §10905.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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